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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, deceased, 322 Wilson Avenue, Brooklyn 21, New York,

Petitioner,

vs.

ANHEUSER-BUSCH, INC., a Missouri Corporation, with offices at 200 State Highway, Route No. 1, Newark, New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT OR, IN THE ALTERNATIVE, FOR A SUMMARY REMAND FOR A HEARING *EN BANC*.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT OR, IN THE ALTERNATIVE, FOR A SUMMARY REMAND FOR A HEARING *EN BANC**.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Millie Vecchio, individually and as administratrix of the estate of Mario Vecchio deceased, respectfully requests that a writ of certiorari issue to review the decision and the mandate of the majority of the United States Circuit Court of Appeals for the Second Circuit or, in the alternative, that a summary remand

* Italics are ours, unless otherwise indicated.

be granted for a hearing *en banc* by said Court of Appeals and sustaining the opinion of the dissenting Judge of said Court.

Opinions Below

The opinions of the majority and of the dissenting Judge of the United States Circuit Court of Appeals for the Second Circuit have not been officially reported but are printed in the appendix herein (App. pp. 27-37).

Jurisdiction

The opinion of the majority of the United States Circuit Court of Appeals for the Second Circuit and of the minority were filed on February 24, 1964, and reconsideration was denied by similarly divided Court on March 30 1964, which Court thereafter reopened by an order of May 20th, 1964 and denied said reconsideration by the same divided Court on June 3, 1964.

The jurisdiction of this Court is invoked by U. S. C. Title 28, Section 1254.

The jurisdiction is also invoked under the following provisions of Rule 19 of this Court:

(1) The majority of said Court of Appeals, despite its holding that the District Court denied to the petitioner constitutional guarantees of due process under the Fifth Amendment and of fair trial by jury under the Seventh Amendment, failed to grant to the petitioner a new trial contrary to the decisions of this Court and of other Courts of Appeal.

(2) The majority of said Court of Appeals has decided an important question of federal civil procedure in a direct conflict with the applicable decisions of this Court.

(3) The majority of said Court of Appeals decided an important question of New Jersey law relating to the re-

lationship between a contractor and an invitee workman, an employee of an independent contractor, in conflict with the applicable state law as shown by the dissenting opinion and the New Jersey cases cited therein. The state of New Jersey is one of the foremost industrial states of the Union, and said decision affects hundreds of thousands of similar workmen employed in New Jersey, but resident in New York and Pennsylvania, and vice versa, employed in New York and Pennsylvania, but resident in New Jersey.

Questions Presented

This case presents important questions of Federal Constitution and Federal procedural law, as well as important questions of common law relating to the master and servant relationship, identical in all common law states, including New Jersey:

(1) Whether, after holding that the District Court denied the petitioner constitutional guarantees of due process of law under the Fifth Amendment to the Federal Constitution and of fair trial by jury under the Seventh Amendment to the Constitution, the majority of the Court of Appeals may disregard these violations and deny a new trial because of other considerations.

(2) Whether the majority of the said Court of Appeals in reversing the District Court which refused to grant directed verdict to the defendant, had the power to direct judgment for the defendant on said motion for directed verdict, despite the absence of a motion for judgment by said defendant, as required by Rule 50 of Federal procedure.

(3) Whether the majority of said Court of Appeals correctly reversed the District Court's holding that the question of the assumption of risk by the deceased invitee, Mario Vecchio, was a question for the jury under the Federal and New Jersey law.

Statement

The husband of the petitioner, Millie Vecchio, was a master electrician who worked as such for Art Kraft Strauss Sign Corporation. On the accident in question, i.e., on April 25, 1960, he was 38 years of age, was married to the petitioner, and had a son, 11 years old. He was in perfect health, and earned $175 per week.

Art Kraft Strauss, in 1951 contracted with Anheuser-Busch, Inc., to set up two neon and electric light signs on the ten-story building it constructed on New Jersey Highway, Route No. 1 near Newark, New Jersey, as a part of a brewery to serve its eastern market.

The signs were identical, one was on the north side of the roof and the other on the south. We are only concerned with the south sign.

The scaffold, and the sign itself, the Court of Appeals unanimously held were owned by the defendant and were fixtures attached to its real estate. The scaffold consisted of a wooden platform with metal bars to hold it together. It rested on metal brackets which were fitted and embedded in the brick wall of the ten-story building, about 15 or 20 feet below the roof to which the sign was attached. The scaffold moved on two cables five-eighths of an inch thick, made of twisted wire. One end of each cable was attached to the winch, located at each end of the scaffold. The other end of each cable was attached to the metal girder protruding forward in front of the sign on each side of the sign. The girder was part of the metal structure to which the sign was attached. One end of iron bars holding the structure was embedded in the roof of the ten-story building through iron studs attached to the steel beams in the ten-story building.

There was no approach to the top or the middle of each sign for servicing it except by taking the elevator to the roof of the ten-story building and then using the scaffold

up and down in front of the sign to reach the defective neon or electric lights.

Adjoining the ten-story building with the signs was a six-story building with several vents, used as exhausts for steam and other vapors from the operation of the defendant's brewery. Little further there was a separate building containing the main boiler of the defendant's brewery which used number six fuel oil and which had a chimney stack emitting fumes and smoke containing sulphurous acids reaching the south sign only. The brewery was in complete control of the defendant who maintained iron bars and wire fences around it with locked gates and guards. The defendant had made in 1956 a contract with Art Kraft for complete maintenance of the signs. The contract describes in detail each part of the sign to be taken care of by the Art Kraft and specific work to be done in regard to said parts (App. p. 38). There is not one word in the contract relating to any work to be done or to any act of maintenance required in regard to the scaffold.

Prior to the accident Vecchio was once or twice doing electrical work on the signs of the defendant during the period of seven years preceding the accident (App. p. 40). Picconi, foreman of Art Kraft who supervised the maintenance work each time done by Art Kraft on the signs of the defendant testified that in seven years prior to the accident, he had done work on the signs 40 or 50 times. This means that on the average the maintenance crew of Art Kraft visited the premises for a few hours every six weeks or thereabouts (App. p. 40). In other words, they came for a few hours to do their work about 9 or 10 times a year. The rest of the time the buildings and the signs and fixtures attached to them were owned and exclusively controlled and supervised by the defendant.

Art Kraft men only came to do maintenance work on the signs when requested by the defendant, because the signs required such work and showed deterioration. Picconi testified that whenever he had time he would oil

the cables on the scaffold. There is not one word of testimony that Vecchio ever did any work on the scaffold, ever oiled the cables on it or had anything to do except his electrical work as master electrician (App. p. 41).

On April 25, 1960, the day in question, Art Kraft in New York, received a telephone call from the defendant that some of the sign lights required replacement. Thereupon the crew of Art Kraft, with Picconi, Vecchio and a helper named Brennan took with them wire for testing the electrical equipment on the signs, and also neon and electric bulbs to replace those that deteriorated (App. pp. 41, 42) and after working at some other place in the morning arrived at the defendant's brewery plant at about 10:00 a.m.

The evidence shows that no oil or brushes or any other equipment necessary to service the metal cables on the scaffold were taken by them to the defendant's plant. No instructions whatever were given to Art Kraft or communicated to it by the defendant as to the possible maintenance or checking or correcting any defects in the cables of the scaffold in front of the south sign. Despite the fact that the cables were in use since 1951 and were 9 years old, no instructions of any kind were given to the crew of Art Kraft as to the possibility of corrosion of the cables or other defects to the scaffold (App. pp. 41, 42).

On arriving at the defendant's building at 10:00 a.m. on April 25, 1960, the three men proceeded to check the lights on the south sign and use the scaffold for that purpose for two hours, servicing the top of the south sign. At 12 p.m. the crew went to lunch and after they returned and went back to the scaffold Picconi and Vecchio changed their positions on the scaffold. Since they had finished servicing the top part of the south sign, they proceeded to lower the scaffold to reach the bottom part of the south sign. At this time the cable of the scaffold on the side occupied by Vecchio broke about 4 feet from the place it

was attached to the girder and Vecchio was thrown off the scaffold which continued to hang on the other cable. Picconi was able to get hold of the guide rope and to raise himself to the roof. Vecchio fell about one hundred feet through the roof, breaking it and was instantly killed in the fall.

It was conceded by the defendant that the cable broke because of corrosion (App. pp. 39, 43-4), and no attempt was made to prove any contributory negligence.

Petitioner also showed through the testimony of competent witnesses that the south sign was enveloped from time to time in a cloud of smoke and steam, so that the Art Kraft men had to wait several minutes before the air cleared up. The smoke contained a special odor due to its sulphuric content. The testimony of an expert air engineer showed that this sulphuric content was due to the fuel oil used by defendant in its boiler and that the combination of this sulphuric acid and the vapors from the vents of the defendant's plant greatly accelerated the deterioration of the cables used on the scaffold (App. pp. 42-4).

The maintenance contract of Art Kraft prescribed no duties as to elimination of any faults in operation of defendant's boiler chimney or exhaust vents. So that, insofar as these vents and said chimney affected the safety of the scaffold used by the deceased invitee, the responsibility was solely that of defendant invitor. Such responsibility under New Jersey law is distinct from failure to provide safety means required by the N. J. Safety Code. (*Burns* v. *Delaware and Atlantic Telegraph Co.*, 70 N. J. L. 745.) The code requires by its terms the person supplying and owning the scaffold to comply with certain safeguards. We are not dealing here with a case where a scaffold was constructed during the performance of the work or brought in by the subcontractor as his appliance. Here, the scaffold was a fixture owned and attached permanently to defendant's building for permanent use as access to the displays, just as their building elevator was

used to reach the roof. According to said Code, such scaffold at all times must sustain four times its normal load (sec. 34:5-106), the cables on it must sustain six times the maximum load (sec. 34:5-110). There is no proof that the defendant ever asked Art Kraft to make such tests or that it itself ever made them. Of course, if such tests were made in this case, the cable in question would have been broken and its defects discovered before the deceased used the scaffold.

Section 34:5-58 of said Code requires that all cables on a scaffold before put in use should be tested "at least once in every thirty days while in use, to insure their safety and suitability for the purposes to which they are to be put. A record of tests * * * shall be kept posted and accessible to all persons having a direct interest in the safety of the cables." As Art Kraft men visited defendant's plant on the average about every 45 days, the defendant knew that Art Kraft did not and could not comply with this section, and as the defendant was in actual control of the scaffold all of said thirty days it became defendant's duty to make such tests and keep the record thereof. The proof in this case lacks any evidence that any test at any time was conducted by anybody.

The District Court failed to give any instructions to the jury on the legal duty of the defendant to the deceased invitee. The jury having no instructions as to what such duty was probably concluded that the defendant had no duty towards the deceased invitee and brought a verdict for the defendant.

The Circuit Court of Appeals unanimously held that the District Court erred in his duty in failing to give instructions on the law to the jury. The minority (Medina, C. J.) held that the new trial should be granted to the petitioner. The majority (Marshall and Waterman, C. JJ.) held that the District Court also erred in failing to grant the motion of the defendant for a directed ver-

dict and granted said motion, despite the failure of the defendant to make a motion for judgment as required by Rule 50 of the Federal procedure.

The majority held that said motion for directed verdict to the defendant should have been granted because of the alleged assumption of risk by the deceased invitee (App. p. 34). The minority held that under New Jersey law the deceased in this case did not assume the risk of defective cables on the scaffold, and that the petitioner on the facts herein was entitled to a new jury trial (App. p. 37).

REASONS FOR GRANTING THE WRIT

POINT I

The majority of the Court of Appeals, having found that the District Court in failing to instruct the jury on the legal duties of the defendant towards the deceased invitee, Mario Vecchio, and thereby depriving the petitioner of due process of law under the Fifth Amendment to the Federal Constitution and of a fair trial by jury under the Seventh Amendment to the Federal Constitution, erred in failing to grant a new trial, irrespective of any other considerations.

Here the unanimous Court of Appeals held that the District Court erred in failing to instruct the jury as to the legal duty of the defendant to the deceased invitee, Mario Vecchio (App. pp. 28, 36). The question is, whether it is proper for a Court to enter into consideration of other matters in the case and deny the new trial to the party who has been deprived of the constitutional guarantees of due process and fair trial by jury in the trial appealed from.

The Fifth Amendment to the Federal Constitution provides:

> "No person * * * be deprived of life, liberty, and property without due process of law."

The Seventh Amendment to the Federal Constitution provides:

"The right to trial by jury shall be preserved."

In *Baltimore and Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, this Court said at page 657:

> "The aim of the (7th) Amendment, as this Court has held, is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, *and particularly to retain the common law distinction between the province of the court and that of the jury, whereby*, in the absence of the express or implied consent to the contrary, *issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.*"

In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, the question was whether a State may so alter the law as to the jury trial in a negligence case as to deprive the judge of the right and duty to determine the questions of law. This Court said at page 93:

> "* * * the rule cannot be regarded as one that relates merely to practice or to a 'form' or 'mode of proceeding'. The provision 'cuts deep into the right, observed at common law, by which the defendant can obtain a decision by the court, upon a proven state of facts' (Atchinson, Topeka & Sante Fe Ry. Co. v. Spencer, 20 F. (2d) 714, 716)."

This Court then continued at page 95:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides.* As was said by Mr. Justice Story, in

> *United States* v. *Battiste*, 2 Sumner, 240, 243: 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.'"

In *Gasoline Products Co.* v. *Changlin Co.*, 283 U. S. 494, this Court said at page 498:

> "It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. *All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court* as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common 'law'. See Herron v. Southern Pacific Co., 283 U. S. 91."

In *Limick* v. *Schiedt*, 293 U. S. 474, this Court said at pages 486 and 487:

> "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts * * *.
>
> To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley, in 1 Court Limitations, 8th Edition, 124."

A denial of the guarantee of fair jury trial provided by the Seventh Amendment to litigants in the Federal Court is at the same time a denial of due process guaranteed by the Fifth Amendment.

In *Windsor* v. *McVeigh*, 93 U. S. 274, this Court said at pages 282 and 283:

> "Though the court may possess jurisdiction of a cause of the subject matter, and of the parties, it is

still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law * * *.

The doctrine stated by the counsel (that by seizure of property in an action in rem court acquired jurisdiction not assailable collaterally, despite absence of a hearing on the merits of seizure) is only correct *when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs* and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In *Pennoyer* v. *Neff*, 95 U. S. 714, the court said at page 733:

"They (words 'due process of law') then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisdiction for the protection and enforcement of private rights."

Accord:

Endicott Co. v. *Encyclopaedia Press*, 266 U. S. 285, 288;
Scott v. *McNeal*, 154 U. S. 34, 46.

The majority of the Court of Appeals sustained as valid the trial of this case despite the violation of said Fifth and Seventh Amendments to the Federal Constitution.

In *Griffin* v. *Griffin*, 327 U. S. 220, this Court said at page 229:

"Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."

In *Old Wayne Life Association* v. *McDorough*, 204 U. S. 8, this Court said at page 15:

> "* * * no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings, if they are wanting in the due process of law required by the fundamental law."

It is also settled law that the courts will not measure the redress of constitutional violations by the result of the proceedings in which such violations occurred.

In *Patton* v. *United States*, 218 U. S. 276, this Court said at page 292:

> "It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been."

In *State* v. *Clow*, 215 Minn. 380; 10 N. W. (2) 359, the court said at page 386:

> "The guaranty of the constitutional rights of an accused is not tested exclusively by the result, but also by the manner in which the result was reached the requirement of due process under the Constitution is not satisfied if the hearing was unfair, though the end might be just. Patton v. United States, 281 U. S. 276."

In *People* v. *Cowan*, 44 Cal. App. (2) 155; 112 P. (2) 62, the court considered section 4½ of Article 6 of the California State Constitution dealing with miscarriage of justice, and said at page 159:

> "The court then pointed out that in applying this section *the matter of guilt or innocence was not to be controlling*, but on the other hand that the matter of how the conviction was obtained was to be considered and the right of the accused to a fair trial under established law and procedure was to be protected."

Accord:

People v. *Mahoney*, 201 Cal. 618 (258 P. 607);
Tupman v. *Haberkorn*, 208 Cal. 256; 280 P. 970.

POINT II

In the absence of motion for judgment by defendant, required by Rule 50 of Civil Procedure, the majority of the Court of Appeals was without power to grant directed judgment, and it erred when it failed to grant to plaintiff a new trial.

In *Globe Liquor Co. Inc.* v. *San Roman*, 332 U. S. 571, 572, this Court granted a writ of certiorari because of the failure of the Court of Appeals to follow this Court's interpretation of Rule 50 of Civil Procedure.

The majority of the Court of Appeals did not affirm jury's verdict, as obtained in violation of the Fifth and Seventh Amendments to the Constitution, but granted defendant's motion for a directed verdict and a judgment based on the latter (App. p. 36).

Rule 50 was interpreted by this court in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, where it said at pages 215, 217 and 218:

> "Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury. • • •
>
> The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand."

In *Globe Liquor Co. Inc.* v. *San Roman*, 332 U. S. 571, this Court said at pages 573 and 574:

> "* * * not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50(b) to have passed upon in the first instance by the trial court. What we said in the Cone case is peculiarly appropriate here; 'Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can import.' It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents."

In *Dunlop Tyre & Rubber Corp.* v. *Thompson*, 273 Fed. (2) 396, verdict was returned by the jury for plaintiff but the plaintiff made no motion for judgment as required by Rule 50, but appealed from the judgment in his favor. Despite the jury's verdict in plaintiff's favor the United States Court of Appeals for the Eighth Circuit said at page 401:

> "Since the plaintiff made no motion for judgment notwithstanding the verdict of the jury, we are precluded from directing the entry of the judgment to which we hold it was entitled. Johnson v. N. Y., New Haven and Hartford R. Co., 344 U. S. 48, 54. The judgment appealed from *is reversed and the case is remanded for a new trial.*"

In *Brown* v. *Alkire*, 295 Fed. (2) 411 verdict was for the plaintiff but no motion was made by the plaintiff for judgment. The United States Circuit Court of Appeals

for the Tenth Circuit, holding that the denied motion for directed verdict was an error, said at page 414:

> "At the conclusion of the defendants' evidence, Brown moved for a directed verdict upon the ground that the defendants had 'failed to establish fraud or a fiduciary relationship, or even a breach thereof', and that the note and indemnity upon which Brown's claims were based were given for a good and valuable consideration. This motion was denied. The plaintiff did not, within ten days after the verdict, move for a judgment in accordance with his motion for a directed verdict as authorized by Rule 50 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. It is urged as a further preliminary matter that the filing of such a motion is essential to a review of any issue arising from the failure of the trial court to direct a verdict. The purpose of this rule is to afford to the trial court a 'last chance to correct errors.' Johnson v. New York, N. H. & H. R. R., 344 U. S. 48, 73 S. Ct. 125, 97 L. Ed. 77; Globe Liquor Co. v. San Roman, 332 U. S. 571, 68 S. Ct. 246, 92 L. Ed. 177; Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849. We think, however, that in the absence of a motion for a judgment n. o. v., the holding of these decisions is that an appellate court may not direct the entry of a judgment, but upon a review of the trial court's denial of a motion for new trial it may remand for a new trial if the evidence is found to be insufficient to sustain the verdict."

Because of the failure of the Circuit Court of Appeals for the Second Circuit to follow the interpretation by this Court of Rule 50 of Civil Procedure and the diversity of its decision in this case with the decisions both of this Court and of the other Circuit Court of Appeals, we submit that this application presents a case where this Court

in the course of its supervision of the judicial function of the Courts below in the Federal system may by summary disposition issue a mandate directing said Court of Appeals to hold a hearing *en banc* of the appeal of the plaintiff to it and on said hearing order a new trial (*U. S. ex rel. Robinson* v. *Johnston*, 316 U. S. 649).

POINT III

The District Court correctly ruled that the assumption of risk by the deceased, Mario Vecchio, if any, was a fact to be decided by the jury and the decision of the majority of the Court of Appeals, to the contrary, is an error.

In this case we have two Judges, one of the Circuit Court and one of the District Court (the latter a Judge who has heard all of the evidence in the case, and considered all of the applicable law of the State of New Jersey), holding that the plaintiff is entitled to a jury trial. The majority of the two Judges of the Court of Appeals held that the defendant was entitled to a direction of the verdict in its favor because of the alleged assumption of risk by the deceased invitee, Mario Vecchio.

In *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, this Court said at pages 67 and 68:

> "*No case is to be withheld from a jury on any theory of assumption of risk:* and the questions of negligence should under proper charge from the court be submitted to the jury for their determination. * * * 'Where the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences' the case should go to the jury."

The dissenting Circuit Judge in his opinion said:

> "Reasonable men might differ on the subject of whether Anheuser-Busch, Inc. knew or should have

known that the clouds of sulfurous vapor came in contact with the cables and might or did cause an acceleration of corrosion. Reasonable men might also differ on the subject of whether a reasonably prudent landowner, under the circumstances of this case, would have warned the contractor of the danger.

I would reverse and remand for a new trial" (App. p. 7).

The majority of the Court of Appeals cited a number of New Jersey cases in support of its holding that the deceased, Mario Vecchio, assumed risk of corroded cable in the scaffold. All of these cases dealt with an accident caused by conditions arising during the performance of the work either by the independent contractor employing the invitee workman or by other independent contractors engaged in the place of work. In this case, the accident arose because of an unsafe fixture owned by and attached by the defendant to the wall of its ten-story building, owned and controlled by the defendant 355 days in each year, and only used by Art Kraft for several hours during ten days every year. The distinction in the facts, bearing on the duty of negligence was pointed out by the Appellate Division of the Superior Court of New Jersey, in *Bergquist* v. *Penterman*, 46 N. J. Super. 78, where the court said at page 83:

> "The controlling consideration is negigence—negligence in respect to the conduct of those who were participants, directly and indirectly at the time and place of the fatal explosion. Cf. Cropanese v. Martinez, 35 N. J. Super. 118 (App. Div. 1955). *Bergquist's injury and death were attributable to what was done in the course of completing the plumbing and floor finishing contract work, and not to a physical condition existing on the premises before the employee came upon the scene*, as in the cases plaintiff cites: Mayes v. Splitdorf Electrical Co., above, 94 N. J. L.

460 (E & A 1920) (unguarded pit in boiler house); Fort v. Reid Ice Cream Co., 98 N. J. L. 559 (E & A 1923) (unguarded elevator shaft); Sutton v. Lerner Stores Corp., 10 N. J. Misc. 1126 (Sup. Ct. 1932) (unguarded pit in basement); or Meny v. Carlson, 6 N. J. 82 (1950) (faulty scaffold)."

The majority of the Court of Appeals cited certain New Jersey cases allegedly sustaining its interpretation of the New Jersey assumption of risk law. The dissenting Circuit Judge said in his opinion:

> "I disagree with the holding that the widow has no rights under New Jersey law * * *.
>
> As I read the New Jersey cases the rule that governs this case is that a landowner owes to employees of a contractor working on the premises a duty to take the precautions for the safety of such employees that a reasonably prudent landowner would take under the circumstances of the case. Hardman v. Ford Motor Company, N. J. Super. Ct., App. Div., 1961, 175 A. 2d 455; Sommer v. Public Service Corporation of New Jersey, Ct. Err. & App., 1910, 79 N. J. L. 349; Zanca v. Conti, N. J. Super. Ct., App. Div., 1962, 179 A. 2d 129; Mergel v. Colgate-Palmolive-Peet Co., N. J. Super. Ct., App. Div., 1956, 125 A. 2d 292; Wolczak v. National Electric Products Corp., N. J. Super. Ct., App. Div., 1961, 168 A. 2d 412; Broecker v. Armstrong Cork Co., N. J. Ct. Err. & App., 1942, 24 A. 2d 194" (App. p. 37).

The majority of the Court of Appeals held that under New Jersey law assumption of risk by contractor was an automatic assumption of such risk by contractor's employees. This is not New Jersey law. In New Jersey, assumption of risk by the employer or any of the co-employees is not the assumption of risk by the injured employee unless he personally and voluntarily accepted it.

In *Burns* v. *Delaware and Atlantic Telegraph Co.*, 70 N. J. L. 745, the court said at page 752:

> "*It is his voluntary acceptance* of or persistence in an employment that involves personal hazard that debars his action; the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant, he cannot be held to have voluntarily assumed it, although the physical surroundings that create danger are known to him."

In *Lechman* v. *Hooper*, 52 N. J. L. 253, the employer and some of his employees were warned by the mason contractor that one completed wall was not safe, but the plaintiff knew nothing of the said notice and was injured. The court held that the employer was not plaintiff's agent to decide for him whether or not to accept a hazardous job. The court said at page 253:

> "No adjudication has been referred to, nor has any been discovered, that indicates that the workman, under the circumstances in question is not entitled to decide for himself whether or not he will encounter these perils or will avoid them * * *.
>
> The law should relax none of its strictness in favor of him, who by his rashness or negligence, has placed an innocent person in peril."

On the facts herein, the Court of Appeals should have directed verdict in plaintiff's favor, because of the absence of any facts showing, that the deceased, a master electrician, ever did any work of servicing the scaffold or its cables or was ever instructed to do so or had anything to do with such servicing.

The majority of the Court of Appeals held that the 1956 agreement between the defendant and Art Kraft

covered "Complete maintenance" of the advertising signs. As the facts show, the scaffold was not part of the advertising signs, but was a fixture owned and controlled by the defendant and attached to the defendant's ten-story building. The contract described in detail all of the parts of the signs to be serviced by Art Kraft and the manner of servicing these different parts. It did not mention the scaffold at all (App. p. 38).

However, assuming for the sake of the argument only, that the maintenance contract of Art Kraft applied to the scaffold, we have a conceded fact that during nine years of the use of the cable in question it was never inspected by the defendant to check on the maintenance work on the cable by the Art Kraft. Both the statute and the common law of New Jersey imposed such duty on the defendant as owner-invitor, and made it liable for its neglect to perform this duty to its invitees.

In *Schwartz* v. *Zulka*, 70 N. J. Super. 256, an employee of an independent contractor was injured in a fall caused by a protruding nail left on the roof, the place of work, by the prior independent contractor. The court said at pages 261-263:

> "The rule as to the duty of due care by a land occupier requires additional refinement, however, in application to a situation where the occupier, whether an owner or a general contractor in control of a building under construction, is having repair, maintenance or construction work done thereon by an independent contractor. Since the work contracted for may be faulty and constitute a hazard to invitees coming onto the premises thereafter, particularly employees of subcontractors, see Meny v. Carlson, 6 N. J. 82, 95 (1950), there may under appropriate circumstances be a duty of inspection by the land occupier of the work of the subcontractor, default as to which and consequent injury to an invitee may subject the occu-

pier to liability to the injured invitee. Prosser, Torts (2nd ed. 1955), Sec. 64, pp. 358-359; Harper and James, Torts, sec. 26.1, p. 1362, sec. 26.11, p. 1405; 2 Restatement, Torts, sec. 412, pp. 1114-18; see Bergquist v. Penterman, 46 N. J. Super. 74, 85 (App. Div. 1957), certif. den. 25 N. J. 55 (1957); Blankley v. Nostrame, 30 N. J. Super. 405, 407-8 (App. Div. 1954). • • •

"While defendant could not fairly be assigned a duty in respect of risks inherent in the elevation at which plaintiff worked, per se, yet the hazard of falling by tripping over a random obstruction left by the previous contractor and carelessly missed by the inspection efforts of defendant is within the fair ambit of defendant's duty, if the jury elects to make the finding and draw the inferences equating with negligence.

"Thus we conclude defendant's position cannot be maintained insofar as it is based upon either absence of liability as a matter of law or insufficient evidentiary support."

Under New Jersey law a maintenance contract implies assumption of risk only as to the known and visible dangers and does not relieve the owner of liability to the invitee workmen for latent and fatal defects in supplied appliances.

In *Dillenberger* v. *Weingartner*, 64 N. J. L. 292, the court, speaking of a safe work place rule, said at page 298:

"The qualifications of this rule are that the workman takes upon himself, during the continuance of his employment, all the risks and dangers *which are obvious to him or can be perceived by him* in the exercise of his senses and the use of ordinary care and circumspection." (Citing cases.)

In *Mengel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 Atl. (2) 292, the court said at page 379:

> "Assumption of risk, though usually applied to the relationship of master and servant, may be used in other fields. No matter where applied, the doctrine may involve no fault or negligence, but rather entails the undertaking of *a risk of known danger.*"

Accord:

> *Gudnestad* v. *Seaboard Coal Dock Co.*, 15 N. J. 210, 223.

The vapors emitted from the vents of defendant's brewery and the sulphuric acids in the smoke of the chimney of defendant's boiler came from utilities of the defendant concededly outside of the maintenance work of the Art Kraft. Under the law of New Jersey where an invitee workman is injured by conditions unrelated to the work undertaken by him, the owner is liable for damage caused to him by negligence in not removing these dangerous conditions.

In *Farrell* v. *Diamond Alkali Co.*, 16 N. J. Super. 163, a plumber employed by an independent contractor for plumbing work was injured by the chrome dust floating in the defendant's plant and produced by its operations other to those relating to plumbing. The court said at page 167:

> "In the instant matter, the defendant was aware of the nature of the hazard which the dust created at its premises; on the other hand, invitees, although they could observe the dust, would ordinarily be unaware of its identity and latent danger unless properly cautioned. *Under these circumstances the defendant was under a duty to take proper steps for the protection of its invitees against chrome exposure.*"

Under the law of New Jersey where the sole access to the place of business is supplied by the owner and is under his control, the use by the workmen of such means of access is deemed directed by the owner, and such direction negatives any application of the doctrine of assumption of risk.

In *Meny* v. *Carlson*, 6 N. J. 82; 77 Atl. (2) 245, the court said at page 250:

> "Ownership of the scaffold, erection of the scaffold and the properly inferrable invitation by this defendant to the plaintiff to use the scaffold created an inference from which the jury could justifiably determine that the scaffold was under the control of this defendant."

In *Reiter* v. *Max Marx Color & Chemical Co.*, 67 N. J. Super. 410; 170 Atl. (2) 828, the court said at page 413:

> "* * * the evidence established prima facie that the use of the ladder was to gain access to the work and not part of it and that the jury would have been justified in finding that the defendant knew or should have known that plaintiff would enter the tank.
>
> If it resolved these questions in plaintiff's favor, it could then * * * resolve the remaining question, likewise within its province, viz.: whether the defendant was negligent in the performance of its aforesaid duty (i.e., to supply a safe place to work)."

Accord:

O'Neill v. *Gray*, 30 F. (2) 776, 779, cert. den. 279 U. S. 865;
Quigley v. *Thatcher*, 207 N. Y. 66, 69.

Under New Jersey law, the question of assumption of risk is purely factual and is for the jury.

In *Beck* v. *Monmouth Laundry Co.*, 137 N. J. L. 268, the court said at page 277:

> "The question of assumption of risk is therefore purely factual and was properly for the determination of the jury, Burns v. Delaware and Atlantic Telegraph Co., 70 N. J. L. 604; Walz v. Public Service Electric and Gas Co., 7 N. J. Misc. R. 993; Robbins v. Riess, 117 N. J. L. 389."

In *Meny* v. *Carlson*, 6 N. J. 82; 77 Atl. (2) 245, the court cited with approval from *Biondini* v. *Amship Corp.*, 185 Pac. (2) 94, 104 at page 93:

> "It was for the jury to say whether either or both of these defendants had 'control' of the scaffold, and if it should find that either or both had such control it should be instructed that the doctrine under discussion is applicable to that defendant or defendants."

Again, non-suit cannot be granted to the defendant on the facts herein. In *Riley* v. *Jersey Leather Co.*, 100 N. J. L. 300, the court said at pages 3 and 4:

> "It was therefore open to the jury to find that the plaintiff did not know, and that an ordinary prudent man under the circumstances would not have known of the danger in part created by the defendants that necessitated warning or precautions for plaintiff's safety and, hence, the non suits upon the grounds of assumption of risk were not justified."

Wherefore, your petitioner respectfully prays that her petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit be granted and that the said Writ be issued to the said Court, or, in the alternative, a summary mandate be issued to said Court

of Appeals and it be directed to proceed in the determination of the petitioner's appeal herein through a hearing *en banc*.

Respectfully submitted,

MILLIE VECCHIO,
Individually and as Administratrix
of the Estate of Mario Vecchio, deceased.

AUGUSTIN J. SAN FILIPPO,
Counsel for Petitioner,
233 Broadway,
New York, N. Y. 10007.

WO 4-8066.

Verification

CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:
STATE OF NEW YORK

MILLIE VECCHIO, being duly sworn, deposes and says:

That she is the above named petitioner. That she has read the foregoing petition and that the statements therein contained are true to her own knowledge.

MILLIE VECCHIO.

Sworn to before me this
15th day of ~~May~~, 1964.

GERSON L. SCHWELLER,
Notary Public,
State of New York.
No. 03-3561425.
Qualified in Bronx County.
Commission Expires March 30, 1965.

APPENDIX

Majority and Minority Opinions of United States Court of Appeals For the Second Circuit.

No. 202—September Term, 1963.

Docket No. 28429

Millie Vecchio, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, Deceased,

Appellant,

v.

Anheuser-Busch, Inc.,

Appellee.

Before: Medina, Waterman and Marshall, *Circuit Judges.*

In a diversity action plaintiff sought damages for the death of her decedent, killed while working in New Jersey. After a jury verdict for defendant in the United States District Court for the Eastern District of New York, and entry of judgment for the defendant thereon, Abruzzo, *J.*, plaintiff appeals on ground that court's charge was erroneous because the judge submitted to the jury as a question of fact the extent of defendant's duty to plaintiff's decedent at the time of the accident. At the close of plaintiff's evidence and again at the close of all the evidence defendant had moved for a directed verdict, claiming that under the

applicable law, the law of New Jersey, defendant owed no duty to plaintiff's decedent at the time of the accident. Though the charge was erroneous, we hold that it was also erroneous not to have granted defendant's motion for a directed verdict. The judgment below for the defendant is affirmed.

AUGUSTIN J. SAN FILIPPO (Borris M. Komar, Augustin J. San Filippo, of counsel), New York City, *for Appellant.*

HANLON & DAWE (Francis J. Healy, Esq., E. Richard Rimmels, Jr., Esq., of counsel), Garden City, N. Y., *for Appellee.*

WATERMAN, *Circuit Judge:*

On April 26, 1960, Mario Vecchio, an electrician employed by the Art Kraft Strauss Sign Corporation, fell to his death while servicing an electric sign atop a Newark, New Jersey brewery owned by Anheuser-Busch, Inc. His widow thereafter brought this action against Anheuser-Busch, Inc. in the United States District Court for the Eastern District of New York. The action was grounded on the alleged negligence of the defendant, and jurisdiction was properly based on diversity of citizenship.

At the conclusion of plaintiff's case the defendant moved for a directed verdict in its favor and renewed that motion at the close of its own case. The court refused to direct a verdict, and the case went to the jury. A verdict was returned in favor of defendant, judgment was entered accordingly, and plaintiff has appealed on the ground that the trial court erred in its charge to the jury. While it does appear that the charge given was improper inasmuch as it left to the jury the task of defining the legal duty owed plaintiff's intestate by defendant, the record in the case demands that the judgment entered below be

affirmed. We find that the facts developed by plaintiff during the trial were insufficient to permit recovery under governing New Jersey law, and we hold that defendant's motion for a directed verdict should have been granted.

The sign which plaintiff's decedent was servicing when he was killed was one of two such signs erected atop defendant's Newark brewery in 1951 by Art Kraft Strauss Sign Corporation, decedent's employer. Emblazoned with defendant's advertising emblem, and equipped with electric lights and neon tubing, the sign stood 30 feet high and 25 feet wide. It was supported by a metal structure embedded in the roof of the two-story brewery.

Access to the sign for servicing was had by means of a scaffold built onto it by Art Kraft Strauss when the sign was erected in 1951. The scaffold extended the length of the sign, and was supported by two cables of wire rope which were attached to its metal top. Winches on the scaffold enabled workmen servicing the sign to move the scaffold up and down on the cables. The scaffold and cables were destroyed by a hurricane in 1954 and were replaced at that time by Art Kraft Strauss Sign Corporation, decedent's employer. The replaced cables and scaffolding remained on the sign until the day of plaintiff's decedent's unfortunate accident in 1960.

On the day of the accident Art Kraft Strauss ordered plaintiff's decedent and two of its other employees to service the signs on top of defendant's brewery. They were furnished with special wire for testing each sign's electrical equipment and with new electric lamps and neon tubing to be used in replacing any fixtures they might discover had deteriorated. Art Kraft Strauss issued no warnings to decedent and its other workmen relative to the condition of the scaffolding and cables on the signs.

Plaintiff's decedent and his fellow workmen arrived at defendant's brewery and proceeded to service one of the signs. Decedent and another workman, Picone, were on

the sign's scaffold when the accident occurred. They had been working with the scaffold hoisted to the top of the 30-foot sign, and, having completed their work there, were lowering the scaffold. The cable supporting the side of the scaffold occupied by plaintiff's decedent suddenly snapped, and both men were thrown off. Picone managed to save himself by grabbing onto a guide cable, but plaintiff's decedent fell 100 feet through the roof of a lower adjoining building and thereby met his death.

Plaintiff claimed at the trial that at the time of the accident the advertising sign and its attached scaffold had been owned by defendant Anheuser-Busch, Inc., and that defendant had been negligent in failing to keep the scaffolding and cables in a safe condition. She introduced evidence tending to show that the cable which had snapped had done so because of deterioration caused by corrosion, that the cables had not been protected or covered in any way, and that smoke and vapors emitted from defendant's brewery buildings may have accelerated the corrosion of the cables.

When Art Kraft Strauss erected the sign in 1951, it entered into an agreement with defendant through the latter's advertising agent which provided, *inter alia*, that title to the sign was to remain in Art Kraft Strauss until certain payments had been made to it by defendant. Another agreement was entered into in 1956, providing primarily for maintenance of the sign by Art Kraft Strauss, but also containing reservation of title provisions similar to those which had been incorporated into the 1951 agreement. Plaintiff contends that, despite the reservation of title provisions and the failure of defendant to make one payment called for in the contract, title nevertheless had passed to defendant by the time of the accident. Defendant argues that title had not passed. We find no need to examine in detail the part of the agreement relating to passage of title or to the effect of the payments made

pursuant to it, for it is clear that the defendant must be treated as the owner of the sign for the purposes of this case. Indeed, we will assume while we examine plaintiff's claimed grounds for liability that defendant did, in fact, own the sign at the time of the accident in 1960.

By far the more important part of the 1956 agreement was that part dealing with the maintenance and care of the sign. The agreement expressly stated that it was to cover its "complete maintenance" and that of the companion sign, and the responsibility for this maintenance was placed on decedent's employer, Art Kraft Strauss. As the scaffolding and cables were part of the sign, and were used exclusively for maintenance operations by Art Kraft Strauss's employees, Art Kraft Strauss was responsible for maintaining both the scaffolding and cables and the advertising portion of the sign. Plaintiff's counsel admitted as much in the course of a colloquy with the court below, and plaintiff's own witness, one of decedent's fellow workmen, testified that he had himself inspected and greased the scaffold cables "forty or fifty times" while working on the sign on previous occasions. It was undisputed that Art Kraft Strauss had erected new cables and scaffolding to replace those destroyed by a hurricane in 1954. No evidence was introduced by plaintiff tending to show that employees of defendant had ever worked on the sign, or the cables, or the scaffolding, or had ever directed work on them. Under New Jersey law, these facts being uncontroverted, defendant violated no duty owed by it to plaintiff's decedent, and any blame for negligence in causing the accident in this case must rest solely on decedent's employer, Art Kraft Strauss.

Continuing to treat the defendant as the owner of the sign and the scaffolding, we reach plaintiff's argument that defendant, as such owner, is bound by certain provisions of the New Jersey Safety Code in effect in 1960, R. S. 34:5-1 *et seq.*, N. J. S. A., relating to the maintenance of scaffold-

ing and work at elevated places generally. This argument must fail, however, because of the interpretation the New Jersey courts have given that section of the Safety Code which lists the persons upon whom its provisions are binding. The section in point is section 34:5-161 of N. J. S. A., and it imposes obligations under the Code upon "any manager, superintendent, owner, foreman or other person in charge of any building, construction or other place" where a Code violation occurs. In interpreting this section of the Code, the New Jersey courts have emphasized the words "or other person in charge," and have therefore refused to apply the Code's requirements to persons included within one of the categories set forth earlier in the section but who are nevertheless not in control of the work or premises connected with a Code violation. *Gibilterra* v. *Rosemawr Homes, Inc.*, 19 N. J. 166, 115 A. 2d 553 (1955); *Trecartin* v. *Mahony-Troast Const. Co.*, 18 N. J. Super. 380, 87 A. 2d 349 (App. Div. 1952).

In *Gibilterra* v *Rosemawr Homes, Inc., supra*, one of the defendants, Rosemawr Homes, had hired the United Construction Company to do excavation work on a tract of land owned by Rosemawr. It had also hired one Vellone to do the plumbing work on the project. One of Vellone's employees was injured when a trench dug by United Construction Company's steam shovel operator, Bayley, collapsed. The injured employee argued that Rosemawr, as owner of the land being excavated, was bound by certain provisions of the New Jersey Safety Code relating to excavations. New Jersey's highest court rejected the argument, reasoning as follows:

> "The obligations under the Safety Code, R. S. 34:5-1 et seq., N. J. S. A. . . . are imposed only upon 'any manager, superintendent, owner, foreman or other person *in charge of* any building, construction or *other place*, in which this chapter is violated.' R. S. 34:5-161,

N. J. S. A. (Emphasis supplied.) Whatever may be the case as between Vellone, on the one hand, and United and Bayley, on the other, one or the other of them, and not Rosemawr, was 'in charge' of the 'place,' the trench, where the Code was violated, if it was, and the violations cannot therefore be the basis of liability of Rosemawr." *Id.*, 115 A. 2d at 555.

In the case before us defendant had contracted with decedent's employer Art Kraft Strauss for the latter to maintain and repair the sign and its scaffolding. One of plaintiff's own witnesses testified that he, as an employee of Art Kraft Strauss, had many times inspected and greased the scaffold's cables. No evidence was introduced showing that defendant in any way controlled or directed maintenance work on the scaffolding or the sign itself. Under these circumstances we think it clear that, whatever violations of the Safety Code of New Jersey may have occurred and may have operated to cause decedent's accident, defendant was not charged with any liability for them.

The fact that Art Kraft Strauss, plaintiff's decedent's employer, had complete control over the maintenance of the sign and scaffolding also precludes recovery under the second theory of liability advanced by plaintiff. This contention is that defendant, as owner of the premises upon which plaintiff's decedent was working, breached its duty to furnish decedent, an invitee workman, with a safe place to work.

It is settled law in New Jersey that where an owner of property engages an independent contractor to do work on his premises, he owes to the contractor's employees who enter the premises to perform the work the duty of exercising reasonable care to furnish them with a safe place to work. E.g., *Gudnestad* v. *Seaboard Coal Dock Co.*, 15 N. J. 210, 104 A. 2d 313 (1954); *Beck* v. *Monmouth Lumber Co.*,

137 N. J. L. 268, 59 A. 2d 400 (1948); *Murphy* v. *Core Joint Concrete Pipe Co.*, 110 N. J. L. 83, 164 Atl. 262 (1933); *Zanca* v. *Conti*, 73 N. J. Super. 23, 179 A. 2d 129 (1962).

This duty is qualified, however, by the rule that one who engages an independent contractor to do work for him, and who does not himself undertake to interfere with or direct that work, is not obligated to protect the employees of the contractor from hazards which are incidental to or part of the very work which the independent contractor has been hired to perform. *Gibilterra* v. *Rosemawr Homes, Inc., supra; Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24 A. 2d 194, (1942); *Wolczak* v. *National Elec. Prods. Corp.*, 66 N. J. Super. 64, 168 A. 2d 412 (App. Div. 1961); *Jensen* v. *Somerset Hospital*, 58 N. J. Super. 204, 156 A. 2d 25 (App. Div. 1959), *certification denied*, 31 N. J. 551, 158 A. 2d 451 (1960); *Mergel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 A. 2d 292 (App. Div. 1956); *Trecartin* v. *Mahony-Troast Const. Co., supra.*

Thus, in *Broecker* v. *Armstrong Cork Co., supra*, where an employee of a contractor hired to replace a deteriorated roof fell through the roof and was injured, the court found no liability on the part of the owner for failing to provide scaffolding or otherwise guard the employee against the danger arising from the weakened condition of the roof. And in *Gibilterra* v. *Rosemawr Homes, supra*, the owner of premises under excavation was found not to be liable to the employee of a plumbing contractor who, while laying pipe in a ditch dug by another contractor, was injured when the wall of the ditch collapsed.

On the other hand, the owner was not permitted to take advantage of the above rule and escape liability in *Zanca* v. *Conti, supra*, where the employee of a contractor hired by a village to install a sewer was injured when a water main alongside the sewer trench burst, the court emphasizing that the contractor had been hired "to install a sewer, not to make repairs to the water main." 73 N. J.

Super. 23, 179 A. 2d 129, 137. The same result was reached in *Reiter* v. *Max Marx Color & Chemical Co.*, 67 N. J. Super. 410, 170 A. 2d 828 (App. Div. 1960), where the owner of a water tank hired an independent contractor to install a new pipe at the bottom of the tank. One of the contractor's employees who had climbed down into the tank to inspect the fittings on the old pipe was injured when a stationary wooden ladder attached to the inside of the tank wall collapsed. The court refused to deem the hazard posed by the weak ladder a hazard incidental to the work which the contractor had been hired to perform, for it noted that the contractor had not been called upon to do any work on the ladder which was merely the means of access to the pipe upon which the contractor and his employees were to work. 67 N. J. Super. 410, 170 A. 2d at 829-830.

In the case at bar, plaintiff's decedent employer had contracted with defendant to provide "complete maintenance" for the sign which decedent was servicing when he was killed. The contract, as explained above, covered maintenance of not only the part of the sign serving as an advertising device but also the attached scaffold and cables. Thus, though decedent was at the time of the accident engaged in servicing a part of the sign other than the scaffolding, he was part of a larger operation of his employer which involved keeping the scaffold in a safe condition.

No evidence was introduced to show that defendant attempted to participate in any way in the maintenance work which it had hired decedent's employer to perform, and it appears that the scaffolding in question was used only by employees of Art Kraft Strauss who serviced the sign. Decedent's co-worker who testified for plaintiff stated that he had himself inspected and greased the scaffold cable on forty or fifty occasions, and he even indicated that the inspection and greasing of the cables had been done by him and other Art Kraft employees on the same days that they had worked on the advertising portion of the sign.

On the basis of these uncontroverted facts, we are forced to conclude that the hazard which caused decedent's death was part of and incidental to the very work which decedent's employer, Art Kraft Strauss, had contracted with defendant to perform, and, therefore, that the governing New Jersey law permits of no recovery by plaintiff as against this defendant. Thus, despite the incorrect charge given the jury when they found for defendant, the judgment entered below for defendant must be affirmed because the lower court should not have submitted the case to the jury at all but should have granted defendant's motion for a directed verdict.

Affirmed.

MEDINA, *Circuit Judge* (dissenting):

I dissent. I agree with my brothers that the New Jersey Safety Code is inapplicable. I also agree that the verdict for defendant rested on an unsound base because of the bizarre way in which the trial judge instructed the jury that it was their function to formulate the rule of law defining the duty of a landowner to employees of a contractor lawfully working on the premises. I disagree with the holding that the widow has no rights under New Jersey law.

As stated in the majority opinion Anheuser-Busch, Inc. must be considered the owner of the sign with all its appurtenances. It was clearly affixed to the building and the owner could not by an agreement with Art Kraft Strauss Sign Corporation divest itself of the duty to furnish a reasonably safe place to work to employees of a contractor who would in the course of their employment do the type of work decedent was called upon to do at the time the cable snapped and he was precipitated to his death. My brothers also correctly state the New Jersey law to be that the landowner "is not obligated to protect the employees of the contractor from hazards which are incidental to or part of

the very work which the independent contractor has been hired to perform." Where I disagree is on the application of this rule to the evidence before us.

There was evidence from which the jury might have found that the snapping of the cable was due, not solely to a failure to grease the cables, but in whole or in part to exhaust vapors containing sulfurous acid that frequently enveloped the cables and caused an acceleration of corrosion. Thus the jury might have found as a fact that this acceleration of corrosion was a substantial factor in causing the accident. If so, the accident was not due exclusively to a hazard that was incidental to or part of the work to be performed by the contractor, and the cases relied upon by my brothers are not applicable.

As I read the New Jersey cases the rule that governs this case is that a landowner owes to employees of a contractor working on the premises a duty to take the precautions for the safety of such employees that a reasonably prudent landowner would take under the circumstances of the case. *Hardman* v. *Ford Motor Company*, N. J. Super. Ct., App. Div., 1961, 175 A. 2d 455; *Sommer* v. *Public Service Corporation of New Jersey*, Ct. Err. & App., 1910, 79 N. J. L. 349; *Zanca* v. *Conti*, N. J. Super. Ct., App. Div., 1962, 179 A. 2d 129; *Mergel* v. *Colgate-Palmolive-Peet Co.*, N. J. Super. Ct., App. Div., 1956, 125 A. 2d 292; *Wolczak* v. *National Electric Products Corp.*, N. J. Super. Ct., App. Div., 1961, 168 A. 2d 412; *Broecker* v. *Armstrong Cork Co.*, N. J. Ct. Err. & App., 1942, 24 A. 2d 194.

Reasonable men might differ on the subject of whether Anheuser-Busch, Inc. knew or should have known that the clouds of sulfurous vapor came in contact with the cables and might or did cause an acceleration of corrosion. Reasonable men might also differ on the subject of whether a reasonably prudent landowner, under the circumstances of this case, would have warned the contractor of the danger.

I would reverse and remand for a new trial.

Description of Maintenance Work by Art Kraft Strauss Sign Corp. for the Defendant in the Contract of November 1, 1956.

"This contract covers complete maintenance of the following displays: Two 'A & Eagle' spectacular displays on roof of Tower Building--one showing to traffic from New York and the other showing to traffic to New York. The structure for the 'A & Eagle' is 24' x 28'. Overall height of Eagle is 21'. Two spectacular displays reading—'Preferred Everywhere' BUDWEISER. One display on roof of Cellars Bldg. showing to traffic from New York; the other spanning the roofs of the Grains and Brewhouse Bldgs., showing to traffic going to New York. 'The 'B' on the word Budweiser is 12' tall and the lower case letters 7' 6". The letters 'Preferred Everywhere' are 6' high. • • •

It is understood that these displays including the new background panels and new photo-electrical equipment will be kept in excellent condition at all times. The background panels and steel frame will be painted at least once a year and more frequently if required to keep the units in 'excellent condition' • • •.

The background panels behind both sets of Budweiser letters should be painted white; • • •".

Extracts From Stenographer's Minutes.

(References are to pages.)

"The Court: Now, do you dispute, Mr. Healy, that this man was killed as a result of the cable breaking on this scaffold precipitating him down below, and he received injuries that he died from? Do you dispute that?

Mr. Healy: I don't dispute that the cable broke and that caused the accident.

The Court: You don't dispute the cable broke and that caused the accident?

Mr. Healy: That is right.

The Court: You don't dispute that he was working there at the time; that he was a workman there? You don't say that he was a trespasser?

Mr. Healy: No. He is not a trespasser. He was working * * * (pp. 20 and 21).

* * * * * *

"The Court: The letters specify that in 1950 Anheuser-Busch could have exercised its option to own the sign.

The second letter, instead of being one of ownership, was again repeating the same contract of 1951 of maintenance. I think the maintenance takes that out of the case, takes title out of the case. *I think the company, Anheuser-Busch, owed a duty. The fact that it was riveted to the roof and building is a fact the jury should take into consideration as to how much they owed with respect to this sign or doing something about it. I don't know what. I will leave it to the jury.* That is my present thinking * * *" (p. 226).

* * * * * *

Extracts From Stenographer's Minutes.

Dominick Picone testified:

"Q. On April 25, 1960 were you assigned to a particular job? A. Yes.

Q. What job was that? A. The Budweiser sign out in Newark, New Jersey.

Q. Have you been on that job at any time prior to April 25, 1960? A. Yes.

Q. Approximately, where exactly, if you know, how many times had you been there? A. I couldn't tell you exactly, but I went over there quite often, once a month, twice a month.

Q. For how many years? A. I have been over there for at least seven years.

Q. Can you give me some idea of the numbers, the number of times that you have been there? A. *I would say roughly about forty* times or fifty times.

Q. Of these forty or fifty times that you have been there prior to April 25, 1960, were you accompanied by anyone? A. Yes.

Q. How many times were you accompanied, if at all, prior to April 25, 1960, by the deceased, Mario Vecchio? A. I think he was there with me once or twice before that time . . .

Q. Your best recollection is once, at the most twice? A. Yes" (pp. 24-25).

. . . . . .

"Q. Describe what you and Mario did that morning? A. Well, we went up to the roof. We got onto the scaffold. We had some tarpaulins on the winches. We took the tarpaulins off and we loosened up the bottom of the scaffold, which is attached to a couple of irons that she rests on. We looked everything over and we proceeded to start to go up" (p. 41).

. . . . . .

Extracts From Stenographer's Minutes.

"The Court: Were you given any specific orders at any time that you went over?

The Witness: Sometimes I did. If someone in the Anheuser-Busch plant called up that there was something wrong with the Budweiser letters or the north eagles or south eagles, it would specify the trouble; on south eagle or north eagle. That is the only orders I got • • •" (p. 62).

• • • • • •

"Q. Let us take the day of the accident. Did you get any orders from anyone as to what type of work you were to do on that sign and scaffold? A. No. That morning, no. I just got the general procedure to lamp it up" (p. 61).

• • • • • •

"Q. When you went up on that sign on the forty-five or fifty times prior to the time of this accident, was there anything in particular you would do with reference to the scaffolds and cables? • • •

Mr. SanFilippo: I object.

The Court: Excluded. Anything he would do is objectionable. Did you do anything with the scaffolding or cabling?

The Witness: Yes. I looked everything over. I used to grease these cables up. • • •

The Court: At different times?

The Witness: That is right.

Q. Would you make any examination of these cables?

The Court: He said he examined them.

The Witness: I examined the cables when I went over there and greased them up and did everything I could possibly do to them" (p. 64).

• • • • • •

Extracts From Stenographer's Minutes.

Henry Brennan testified:

"Q. What instructions did you receive that morning? A. To go upstairs to the glass room where the glass is repaired and pick up the neon tubes that had been repaired and load them onto the truck.

Q. That is all? A. That is all.

Q. Tell us what you did when you arrived at the Anheuser-Busch Brewery that morning? A. I unloaded the glass, the repaired tubes, and I took two rolls of wire, 14 wire that we use for test and jumping out purposes, and some tags that we used to mark the broken glass, and we brought it up to the roof of the building * * *" (p. 86).

* * * * * *

"Q. Would you describe to the Court and jury what there is on the building directly in front of that A sign? A. Directly in front of it, not directly in front, but the front and off to the left there is another building. It has these smoke stacks on it. It is a gravel roof.

Q. Directing your attention to these smoke stacks, about how many did you notice? A. I would say at least four.

Q. Did you ever have any occasion prior to April 25, 1960, to notice what, if anything, came out of these stacks? A. Yes.

Q. Will you tell us what came out of them? A. Steam.

Mr. Healy: I move that be stricken.

The Court: I will allow it.

Do you know it is steam?

The Witness: Well, it is a white smoke, yellowish, whitish smoke.

The Court: You interpreted that as steam, although you are not sure of it?

The Witness: No, I am not sure.

The Court: Did you put your hand on it?

The Witness: You can feel it with your hand.

The Court: Did you ever feel it with your hands?

The Witness: Well, I felt it with my face and hands, yes, sir.

The Court: What did it feel like?

A. Wet.

Q. What else did you notice about this steam or smoke? A. Well, if you are on the roof, the scaffold, and it came up, you would have to stop work for a couple of minutes until either it cleared or the wind blew it away.

Q. Did you ever have occasion to notice the sign at the scaffold after the smoke had gone and cleared away? A. Yes.

Q. What did you notice then? A. Well, it was wet" (*pp. 86-87*).

Theodore A. Schneider testified:

"Q. I believe you stated you examined this cable on behalf of the Police Department, City of Newark? A. Yes" (p. 173).

* * * * * * *

"Q. Will you tell us what your examination of the winch and the cable on the winch revealed? A. For a distance of one and a half feet from the broken end of this wire on the cable, the conditions were as severe as I indicated before. You had the severe corrosion, the rusting that took place. You had the pitting type of corrosion and it was very dry. This is for a distance of a foot and a half.

Then, in and around the winch, the coiling effect around the winch, we now find that it is dark, dirty

and greasy. As it goes around the winch we now find dirt there and grease appearing on the surface or on this cable.

Q. Did you find any evidence of oxide formation or rusting on that part which was already in the winch and wound up in the winch? A. No, I did not.

Q. Professor, did you arrive at any conclusion on (181) the basis of your examination and investigation with a reasonable degree of scientific certainty as to the cause for the breakage or the failure of this cable? A. Yes, I did.

Q. Will you tell us what that conclusion is? A. Failure, first failure to protect from corrosion" (pp. 180, 181).

Gregory Gould testified:

"Q. There were other elements that would affect it so far as corrosion; isn't that right? A. Yes, I think that is right.

The Court: You have told us that the acid from the fumes is one of the elements.

The Witness: Yes.

The Court: Weather is another element?

The Witness: Yes.

The Court: Rain, how much rain, snow, use, taking all these elements into consideration, can you tell how quickly or how soon or how slowly any cable one-half inch thick as (213) this cable was would corrode; have you any opinion?

The Witness: Relatively, yes. The question of this type would be answered in a relative sense. A cable in a dry atmosphere will corrode very slowly. A cable in a damp atmosphere will corrode rapidly. A cable exposed to an acidic atmosphere will corrode quickly" (pp. 212, 213).

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IN THE

Supreme Court of the United States

No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of MARIO VECCHIO, Deceased,

Petitioner,

against

ANHEUSER-BUSCH, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. ROE,
Attorney for Respondent
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IN THE

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No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, Deceased,

Petitioner,

against

ANHEUSER-BUSCH, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioner in this case commenced this action in the United States District Court for the Eastern District of New York to recover damages for the wrongful death of her intestate and to recover damages for his conscious pain and suffering. The action for conscious pain and suffering was dismissed by the Trial Court for failure of proof, without opposition, and no appeal was taken therefrom (101a). The issues in the wrongful death action were submitted to the jury, and the jury rendered a verdict in favor of the defendant-respondent. The petitioner then appealed to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment entered in favor of the respondent. Thereafter, two successive peti-

tions for reargument were presented to and considered by the said Court of Appeals but that Court adhered to its original decision affirming the judgment in favor of the respondent.

This is an action for negligence that arises out of an accident that occurred at the plant of the respondent, Anheuser-Busch, Inc., located in Newark, New Jersey. All parties are in agreement that in accordance with the rule laid down by this Court in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the substantive law of the State of New Jersey must be applied.

Jurisdiction of the United States Court is based on the provisions of 28 U.S.C.A., Section 1254, there being diversity of citizenship between the petitioner and the respondent.

Statement of Facts

The respondent, Anheuser-Busch, Inc., was the owner of certain real property located adjacent to U. S. Highways 1 and 9 near Newark, New Jersey. In 1951 there was erected on this property by the defendant a brewery which the respondent has operated ever since in order to supply its products for the eastern market. After the erection of the brewery, the respondent entered into an agreement with Artkraft Strauss Sign Corp., the decedent's employer, for the erection of certain advertising signs on the brewery (67a-69a). This original agreement provided that Artkraft Strauss would place the signs upon the building and would provide service and maintenance for the signs for a specified consideration to be paid by the respondent. According to the original agreement title to the signs was to remain in Artkraft Strauss unless and until the payment of certain monies by the defendant to Artkraft Strauss. The monies provided for were never paid (103a). At the end of the original contract period and in 1956 the parties entered into a second agreement which provided,

in essence, for the further maintenance and care of the particular signs by Artkraft Strauss (112a). The second agreement also provided that title to the signs was to remain in Artkraft Strauss Sign Corp. unless, and until the payment of certain monies by the respondent. The monies provided were never paid (105a).

Plaintiff's intestate was providing maintenance for one of these signs on the day of the accident, April 25, 1960, in the course of his employment to his employer, Artkraft Strauss, when the scaffold upon which he was working fell and caused him to be precipitated to his death. The particular sign involved was commonly referred to as the southerly "A-Eagle". This particular sign was constructed by Artkraft Strauss and then was raised to the roof of the tenth floor of this building where it was then bolted onto iron studs which protruded from the roof of the building. The only evidence in the case indicates that the sign was affixed solely by the means of bolts and that it could be removed by merely unbolting it and lowering it to the ground (76a-77a; 108a; 28a-29a).

Artkraft Strauss, in connection with the sign, also provided a scaffold which was used solely by the workmen of Artkraft Strauss in order to gain access to the sign so that it might be painted and so that other maintenance might be provided. Maintenance for the scaffold was provided by Artkraft Strauss.

The particular scaffold in question was on the front of the sign and extended along the entire length of it. It was supported by two cables of 5/8" thick wire rope which were provided and supplied by Artkraft Strauss. These cables were attached to the metal top of the sign and there were winches on the scaffold itself so that the workmen could move the scaffold up and down to proceed with their work. This scaffold and the cables were placed there in 1951 but were destroyed by a hurricane in 1954 and were replaced at that time by Artkraft Strauss. It remained there until the day of the accident in 1960 (109a).

The particular scaffold was supplied, repaired and serviced and was utilized only by the employees of Artkraft Strauss, and the respondent neither inspected the scaffold, the cables nor the sign. One of decedent's own co-workers even testified that they, employees of Artkraft Strauss, were responsible to inspect the cables and the scaffold, to grease and to oil the winch and the cables, and to otherwise maintain the scaffold (78a-79a).

Regarding the accident, it occurred on April 25, 1960 when the decedent, during the course of his employment with Artkraft Strauss, was working on the scaffold with Mr. Dominick Picone. They were replacing certain of the neon tubes which had burned out. As they were working, the steel cable which supported that side of the scaffold on which the deceased was working, broke, and the deceased was precipitated to his death. Mr. Picone, who was also on the scaffold, was able to grab hold of a cable and to climb off the scaffold. The cause of the accident was the breaking of the cable.

The petitioner produced an engineer who examined the broken cable and he testified that the cable was made of steel and that it had broken because it was heavily corroded (84a-85a). The expert stated that the cause of the break was the failure to protect the cable from corrosion (85a). He pointed out that a ferrous metal, such as this cable, will begin rusting almost immediately when exposed to atmospheric conditions (86a). The failure to grease or oil this cable permitted it to rust to such an extent that it was unable to support the scaffold which caused it to break. The sole cause of the accident was that the cable, which had been in place for six years, rusted and corroded to an extent that it was unable to support the scaffold.

At the trial, the petitioner, basically, presented two theories of liability. The first of these was that there was an obligation under the New Jersey Safety Code to

inspect and to make sure that the cable and the scaffold were fit and in proper condition and also to provide the decedent with safety belts or ropes. The trial Judge rejected this theory as a matter of law, holding there was no obligation upon the defendant to comply with the code requirements, this being solely the duty of decedent's employer. The Court of Appeals unanimously concurred in this determination.

Secondly, petitioner contended that the common law of the State of New Jersey imposed a duty upon respondent. It was upon this theory that the trial court submitted the case to the jury; the jury found respondent breached no duty owed and rendered a verdict in favor of respondent. The Court of Appeals unanimously held that the Court below erred in its charge to the jury. The majority held that plaintiff failed to prove the existence of any duty owed by respondent to petitioner and, hence, the trial Justice should have directed a verdict for respondent. On this basis a new trial was refused.

POINT I

Petitioner was not deprived of the right to a jury trial as guaranteed by the Seventh Amendment to the Constitution.

There was in this case a full and complete trial with a jury in the United States District Court for the Eastern District of New York. At that trial the trial Justice dismissed so much of the petitioner's claims as sought recovery under the theory that the New Jersey Safety Code established a duty to inspect and maintain this scaffold. All the Justices of the Court of Appeals concurred in that holding. The trial Justice submitted to the jury the question as to whether or not there was a common law duty under the law of the State of New Jersey. While the Court of Appeals found that there was error in the charge,

it also found that under the proofs presented by the petitioner, there was no duty owing from the respondent to the petitioner; and, hence, affirmed the judgment awarded in favor of the respondent.

Under this state of facts, we believe that petitioner is erroneous in arguing that she has been deprived of the right guaranteed her by the Seventh Amendment to the Constitution to a jury trial. The Court below has held that, conceding all of the facts proven by this petitioner, the law is that there may be no recovery. While the Seventh Amendment guarantees the right to a jury trial, there remains the function of the Court to determine the law to be applied to a case, it being solely the province of the jury to determine the facts. Upon a demurrer to the evidence, it becomes the function of the Court to determine whether, as a matter of law, there are any facts to be determined by the jury or whether, taking the most favorable interpretation of all the evidence, the plaintiff has failed to prove a case. In the event that the petitioner has failed to prove a case, it is clear that the complaint must be dismissed. As was stated by this Court in the case of *Galloway* v. *United States*, 319 U. S. 372, 389: "If the intention is to claim generally that the amendment deprives the Federal Courts of power to direct a verdict for insufficiency of evidence, the short answer is that the contention has been foreclosed by repeated decisions made here consistently for nearly a century." Even the dissenting opinion in the *Galloway* case observed that it was necessary for a plaintiff to present some testimony supporting the case.

The situation here is that the Courts below have ruled that there was no duty as a matter of law owed by the respondent to the petitioner's intestate. "* * * It has been the doctrine of this Court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence,

but whether there is any upon which a jury can properly proceed to find a verdict. * * *" *Coughran* v. *Bigelow*, 164 U. S. 301, 307. In this case the Courts have found that there was no evidence of any sort to support a verdict, the petitioner having failed to establish the existence of any duty owed by the respondent. Under such circumstances, there has been no deprivation of the right to a trial by jury.

POINT II

The Court of Appeals did not err in failing to grant a new trial.

The petitioner in this case raises a novel question with regard to the interpretation of Rule 50 of the Rules of Civil Procedure. Here, the respondent moved for dismissal of the complaint and for a directed verdict at the conclusion of the plaintiff's case and at the conclusion of the entire case. These motions were denied and the issues were submitted to the jury. After the rendition of a verdict for the respondent, no motions were made by respondent for a directed verdict, since it had received a verdict from the jury. Upon appeal, the Court of Appeals held that the trial judge had committed error in his charge; this being the sole error found by the Court of Appeals or claimed by the petitioner. However, the Court of Appeals originally, and through two successive petitions for reargument, held that it would not grant a new trial since the lower court also erred in failing to dismiss the complaint as a matter of law. Petitioner argues that the Court of Appeals was powerless under Rule 50 to do anything except grant a new trial since the respondent did not make the meaningless gesture of moving for judgment notwithstanding the verdict after it had received a verdict.

All of the cases cited by petitioner in her petition are not in point on this issue. In all of them, it was the ap-

pellant who had failed to move for a directed verdict and who was seeking a modification of the judgment below. For example, in the case of *Dunlap Tyre & Rubber Corp. v. Thompson*, 273 F. 2d 369, the plaintiff won a verdict but the amount of that verdict was reduced by the amount of a verdict in favor of the defendant on a counterclaim. With respect to the verdict on the counterclaim, the plaintiff made no motions for judgment notwithstanding the verdict, and upon appeal by the plaintiff, the Court of Appeals was clearly correct in holding that under Rule 50, it could not direct the entry of a judgment dismissing the counterclaim. Neither the *Dunlap* case nor the other cases cited are the same, or even similar, to the instant situation.

Rule 50 (as amended in July, 1963) presents detailed rules as to when a party must move for a directed verdict. In point here is the admonition that after the verdict a party may move within ten days to have any judgment set aside and to have judgment entered in accordance with the motion for a directed verdict. Necessarily, this rule pre-supposes that a party wishes the judgment to be changed and seeks some relief other than the entry of the same judgment that has already been entered. In this particular case, at the conclusion of the trial, judgment was entered in favor of the respondent. What would be the point of a motion for the direction of the entry of judgment notwithstanding the verdict when respondent received a verdict and judgment was entered for it? Clearly, such a motion is not directed by the rule and cannot be made.

Further, we believe that the petitioner completely overlooks the fact that something must be shown to entitle a party to a new trial. Under petitioner's argument, she would obtain a new trial, would come forward and present her facts again, the respondent would move for a directed verdict, and the Court would be bound to grant that motion.

This is relitigation without purpose. To be entitled to a new trial, a party must show some grounds as to why there should be a new trial. As was stated by the Court in the case of *Campbell* v. *Clark*, 271 F. 2d 578, 579: "The sound exercise of judicial discretion may be tested by consideration of whether or not the grounds advanced for a new trial make it reasonably clear that substantial justice has not been done and that a new trial would not constitute relitigation." Under the argument advanced by petitioner here, the granting of a new trial would merely constitute relitigation and would be a burden and a time-consuming process without any purpose whatsoever. We believe that there is nothing in Rule 50 that ever intended such a result and that the respondent did not have to make the meaningless gesture of moving, after judgment was entered, for the entry of the very same judgment.

POINT III

The Court of Appeals correctly ruled that there was no duty owing from respondent to the deceased.

Upon the merits, the petitioner seeks leave of this Court to have it review the determination of the Court of Appeals as to whether or not under the law of the State of New Jersey, both statute and common, the respondent owed any duty to the deceased. The sole issue to be determined is what the law of New Jersey is and its application to this particular case.

The petitioner in this case presented several theories of liability. The first of these theories was that under the New Jersey Safety Code, there was a duty on the part of the respondent to comply with the provisions of the Safety Code and to insure that the scaffold, from which the deceased was precipitated, was safe. The Trial Court and all of the Judges of the Court of Appeals have agreed that, as interpreted by the Courts of the State of New

Jersey, the respondent did not have to comply with the provisions of the Safety Code and could not be held liable for failure to do so. Under Section 34:5—161, N.J.S.A., the obligation to comply with the Safety Code is placed upon "Any manager, superintendent, owner, foreman, or any person in charge of any building, construction, or any place." In interpreting the statutory language, however, the New Jersey Courts have placed emphasis on the words "person in charge" and have refused to apply the Code's requirements to persons who are not in control of the work. *Gibilterra* v. *Rosemawr Homes, Inc.*, 19 N. J. 166; *Trecartin* v. *Mahoney-Troast Construction Co.*, 18 N. J. Super. 380. Under the undisputed facts of this case, the work was being performed by the plaintiff and his co-employees and the respondent was in no way in control. The *Gibilterra* case appears to be in point to the instant situation. In that case the defendant was the owner and developer of a tract of homes and had a contract with one Velone to install certain plumbing work and fixtures and to connect water mains from the houses to the sewers. In order to connect the water, a trench was dug from the house to the main. The Safety Code required the installation of shoring or sheeting to protect workmen in the trench. This was not provided. The work itself had been performed by Velone, with no control over the work itself being exercised by the defendant. Under the facts, the New Jersey Court held that it was proper to dismiss the complaint stating that the duty to comply with the Safety Code was imposed solely upon the person in charge of the work and that, since the defendant was not, it could not be held for a violation of the Code. The same reasoning applies to this case and the Courts below were clearly correct in holding that there was no obligation on the part of the respondent to comply with the Safety Code.

Secondly, petitioner urges the existence of a common law duty. This contention is that respondent, as owner of the premises upon which petitioner's decedent was

working, breached its duty to furnish decedent, an invitee workman, with a safe place to work.

The respondent had contracted with the decedent's employer, Artkraft Strauss, for the latter to install a neon sign on the premises owned by respondent. The agreements also provided for complete maintenance and repair of the sign by Artkraft Strauss. In connection with the sign, Artkraft Strauss also put up a scaffold in order that the repair work and maintenance of the sign might be accomplished. The complete maintenance of the sign and scaffold was performed solely and wholly by the employees of Artkraft Strauss. There was no evidence showing, in any way, that respondent controlled, or directed the maintenance of the scaffold or the sign or that the respondent, in any way, went on or near to the sign or scaffold.

While the decedent was working on the scaffold, one of the cables of the scaffold broke and precipitated him to his death.

The scaffold had been installed in 1951 but had been destroyed by a hurricane in 1954. At that time it had been replaced by the decedent's employer and had been in place up until the time of the accident in 1960. The cable which broke was composed of steel and the experts stated that it rusted through. The cable, like most other steel, would begin to rust upon being exposed to the atmosphere. In order to retard the corrosion, oil or grease would be applied to the cable, this being done by employees of Artkraft Strauss. The maintenance and inspection of the cable was, at all times, performed by Artkraft Strauss. It further appeared that the particular portion of the cable that broke had not been greased or oiled as had the rest of the cable.

Under the law of the State of New Jersey, it seems settled that one who engages an independent contractor to

work for him and who does not interfere with or direct that work is not obligated to protect the employees of the independent contractor from hazards which are incidental to or a part of the very work which the independent contractor has been hired to perform.

Gibilterra v. *Rosemawr Homes, Inc.*, 19 N. J. 166;
Broecker v. *Armstrong Cork Co.*, 128 N. J. L. 3;
Wolczak v. *National Elec. Prods. Corp.*, 66 N. J. Super. 64;
Jensen v. *Somerset Hospital*, 58 N. J. Super. 204, certification denied, 31 N. J. 551;
Mergel v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372;
Trecartin v. *Mahony-Troast Const. Co.*, 18 N. J. Super. 380.

In this case, the respondent had contracted with the deceased's employer to provide complete maintenance for the sign. The contract covered the servicing of the sign and also the scaffold and cables by which the men got up onto the sign in order to service it. The deceased and his co-workers inspected the scaffold and, inspected and greased the cable. One of the hazards of working on that particular scaffold was that it was not safe unless the cable was maintained in proper order. The respondent had entered into a contract with the deceased's employer to properly service the scaffold and the cable. Under the law of the State of New Jersey, the hazards which are incidental to the work of an independent contractor may not form the basis for liability as against the owner. The Court below was correct when it held that under these facts, there was no duty to petitioner's decedent under the law of the State of New Jersey.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. ROE,
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No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, deceased, 322 Wilson Avenue, Brooklyn 21, New York,

Petitioner,

vs.

ANHEUSER-BUSCH, INC., a Missouri Corporation, with offices at 200 State Highway, Route No. 1, Newark, New Jersey,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, FOR A SUMMARY REMAND FOR A HEARING *EN BANC*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, deceased, 322 Wilson Avenue, Brooklyn 21, New York,

Petitioner,

v.

ANHEUSER-BUSCH, INC., a Missouri Corporation, with offices at 200 State Highway, Route No. 1, Newark, New Jersey,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, FOR A SUMMARY REMAND FOR A HEARING *EN BANC*

We do not agree with many statements in the respondent's Statement of Facts. That statement not only differs with the facts in the Extracts From Stenographer's Minutes (Petition, pp. 39-44) but also with the facts as stated in the majority opinion (Petition, pp. 28-31) and the minority opinion (Petition, pp. 36-37).

POINT I

The majority of the Court of Appeals had no power to grant judgment to respondent in the absence of a motion by it for judgment required by Rule 50(b) of Civil Procedure.

Under its Point II, respondent completely failed to answer the question of the lack of power in the majority of the Court of Appeals to grant judgment to the defendant on a new ground in the conceded absence of a motion for such judgment by it, required by Rule 50(b) of Civil Procedure.

The question of such power is not novel, but it was squarely considered and clearly decided by this Court in *Globe Liquor Co. Inc.* v. *San Roman*, 332 U. S. 571, and in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, and in numerous decisions by many Courts of Appeals following the interpretation of Rule 50(b) made by this Court in said decisions.

The respondent argues that these two decisions do not apply because the respondent had a jury's verdict in its favor, although the Court of Appeals unanimously held that said verdict was obtained by it in violation of due process of law under the Fifth Amendment to the Federal Constitution and in violation of fair trial by jury under the Seventh Amendment. The Court of Appeals refused to affirm respondent's judgment based on jury's erroneous decision. This argument was rejected by this Court in the *Globe Liquor Co.'s* case, *supra*, where this Court said at page 573:

> "By its terms the rule applies equally to cases where the verdict returned by the jury was not directed, as in the Cone case, or was directed, as in this case."

The cases cited by us in the petition (at pp. 15-16) show that the Circuit Courts of Appeals uniformly held that the fact that the party entitled in their opinion to a judgment had actually obtained a judgment in the District Court is immaterial to the lack of the power in the Courts of Appeals to grant judgment to a party which failed to comply with Civil Procedure Rule 50(b). In both *Dunlop Tyre & Rubber Corp.* v. *Thompson*, 273 Fed. (2) 396, and in *Brown* v. *Alkire*, 295 Fed. (2) 411, the Circuit Courts of Appeals for the Eighth and Tenth Circuits held that the parties who obtained judgments in the District Courts were entitled to judgments on different grounds. Yet, both courts expressly held that because of this Court's interpretations in the *Globe* and *Cone* cases, *supra*, of said Rule 50(b), they had no power to grant judgment to the successful party in the District Court and were compelled to order merely a new trial, because of the absence of a motion under Rule 50(b) for judgment in the District Court.

The respondent argues that the conceded absence of a motion by it for a judgment in the District Court is a technicality. As this Court pointed out in the *Globe* and *Cone* cases (Petition at pp. 14 and 15), the question depends on the fundamental difference in the federal judicial system of the functions of the District Courts and the Courts of Appeals. The District Courts see and hear the witnesses and all the proof. This Court deemed that the mere examination of papers on the appeals is not a sufficient qualification to determine a right to a new trial. The Advisory Committee on Rules of Civil Procedure in 1946, recommended a modification of the Rule 50(b) which modification would have given the same power to the Court of Appeals as to the District Court to entertain a motion for judgment or for a new trial, but this Court refused to approve such amendment. (See *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 218.)

The respondent claims that before the petitioner is entitled to a new trial, she must show some grounds therefor.

The unanimous opinion of the Court of Appeals below that the charge of the District Court to the jury here violated the Fifth and Seventh Amendments to the Constitution and possibly resulted, therefore, in an erroneous decision by the jury in respondent's favor is surely sufficiently good ground in itself for granting a new trial to the petitioner.

The majority of the Court of Appeals granted judgment to respondent solely because of the alleged assumption of risk by petitioner's deceased (Petition at p. 34). This Court repeatedly held that the question of assumption of risk is always a question of fact and not a question of law (*Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 67-68—Petition at p. 17). The New Jersey cases are to the same effect (*Meny* v. *Carlson*, 6 N. J. 82; *Beck* v. *Monmouth Laundry Corp.*, 137 N. J. L. 268—in the petition at pp. 24 and 25). Are not these decisions another good ground for vacating summary judgment granted to respondent as a matter of law by the Court of Appeals.

As the minority of the Court of Appeals pointed out (Petition at p. 37) the snapping of the scaffold's cable was due to accelerated corrosion because of steam and sulphurous acidic vapors from the smoke chimneys and plant vents of the defendant. Art Kraft had nothing to do with the control or operation of these chimneys and vents (Petition, p. 30). Hence, the question of defendant's negligence in failing to moderate or to eliminate those vapors and their effect on the corrosion of the cable, the cause of the deceased's death, is clearly for the jury.

The unanimous decision of the Court of Appeals was that the scaffold was owned by the respondent (Petition at p. 31). It was part of and attached to respondent's ten-story building, part of its plant (Petition, p. 29).

In *Huston* v. *Dobson*, 138 App. Div. 810; 123 N. Y. S. 892, the Court said at page 896:

"So, the facts that the defendant furnished an improper scaffold not safe for the use for which it was designed, the fall of that scaffold, the fall of the deceased from the place at which he was working which followed the fall of the defective scaffold, was evidence which required the question as to whether the death of the deceased was not due to the negligence of the defendant to be submitted to the jury."

In *McGlone* v. *William Angus, Inc.*, 248 N. Y. 197; 161 N. E. 469, the Court said at page 199:

"There is no dispute apparently that this planking or scaffold gave way, and that the plaintiff was dropped to the cellar.

Negligence is gauged by the ability to anticipate. The Angus Company apparently knew that its men were not the only ones at work upon the building. As the iron work went up, the stone work soon followed. Both classes of employees were working together. When the Angus Company placed boards over the iron beams forming a scaffold or flooring for its derricks, could it reasonably anticipate that other workmen on the structure would walk over the flooring? On the evidence this was a question for the jury."

In *Fitzwater* v. *Warren*, 206 N. Y. 355; 99 N. E. 1042, the Court said at page 358:

"Moreover, in this case the assumption of risk was a fair question of fact for the jury * * *.

"To establish the defense of assumption of risk the burden of proof rests on the defendant (Dowd v. N. Y., Ontario & W. Ry. Co., 170 N. Y. 459), and though the defect be apparent, if it may require judgment not possessed by the ordinary observer or servant to realize the hazard caused thereby, the risk is not assumed. (Davidson v. Cornell, 132 N. Y. 228; Welle v. Celluloid Co., 175 id. 401.)"

In this case, the respondent knew at all times that the scaffold constituted a sole way of access to the sign, the place of work of the deceased, and the defect in the scaffold was hidden and concealed and was unknown to the deceased.

POINT II

The majority of the Court of Appeals ignored controlling limitations on the rule of assumption by workman of incidental hazards in his work.

The Court of Appeals unanimously held that the respondent was the owner of the scaffold (Petition at p. 31).

The record shows that the maintenance crew of Art Kraft visited the premises of the defendant for the maintenance work for a few hours about every six weeks. In other words, for 355 days every year the sign and the scaffold were in the exclusive possession, control and ownership of the defendant (Petition at p. 5). It is conceded here, that the scaffold was the only means of approach to the sign for doing maintenance work on it. The deceased was a master electrician and there is no proof that deceased did any other work except electrical maintenance work on the sign. There is no proof that he ever did any work at all on the scaffold or on its cables.

The majority of the Court of Appeals apparently assumed the elementary law that the owner's obligation to provide a safe place to work for the employees of the independent contractor employed by the owner includes the obligation to keep the ways and approaches to the place of work in a safe condition (*Iacono* v. *Frank & Frank Contracting Corp.*, 259 N. Y. 377; 182 N. E. 23; *De Lee* v. *Pardy Construction Corp.*, 249 N. Y. 103; 162 N. E. 599; *Chaney* v. *N. Y. City Transit Authority*, 12 App. Div. (2) 261; 208 N. Y. Supp. (2) 205). The majority of the Court of

Appeals held that the respondent was entitled to the granting of its motion for a directed verdict because the death of plaintiff's deceased was due to "hazards which are incidental to or part of the very work which the independent contractor has been hired to perform" (Petition at p. 34). The minority of the Court of Appeals dissented from the application of said rule to the petitioner's deceased because the majority disregarded three important limitations of said rule excluding its application to the facts herein.

The first of these limitations is that plaintiff's deceased is not chargeable with the results of a hazard which he was not employed to correct. The law of New Jersey and other common law states is that the employee undertakes only such hazard in his employment as is known to him and as he, himself, voluntarily assumes. The employee does not assume hazards unknown to him, even if such hazards are known to his employer or to his co-employees. In this case, the deceased had nothing to do with the maintenance of the scaffold and its cables. The hazards incurred by Art Kraft or its employees engaged in maintaining the scaffold, or by the failure of the respondent as owner to check on poor maintenance of the scaffold's cables by Art Kraft, are not chargeable to plaintiff's deceased. (See New Jersey cases at p. 20 of the Petition.)

The same law is in force in other common law states. Thus, in *Caspersen* v. *La Salla Bros.*, 253 N. Y. 491; 171 N. E. 754, the owner was held liable for injuries to an employee of independent contractor because a shaftway through which the employee passed on the way to his work was unsafe. In holding the owner liable, Cardozo, Ch. J., said at pages 494-495:

> "The defendant is not chargeable with the negligence of the masons, the servants of the subcontractor. It is chargeable with its own negligence in failing to guard the ways against perils unknown to the worker."

The second limitation on the general rule relied on by the majority of the Court of Appeals is that of non-delegable duty of the owner to provide a safe approach to employees of the independent contractor to the place of work (*Wohlfron* v. *Brooklyn Edison Co., Inc.*, 238 App. Div. 463; 265 N. Y. Supp. 18, aff'd 263 N. Y. 457, 189 N. E. 691, is not eliminated by the owner's use of an independent contractor to do the maintenance or repair work on the place of work or on the approaches to it.

This rule was recently reaffirmed in New Jersey in *Schwartz* v. *Zulka*, 70 N. J. Super. 256, where the Court said at pages 261-263:

> "The rule as to the duty of due care by a land occupier requires additional refinement, however, in application to a situation where the occupier, whether an owner or a general contractor in control of a building under construction, is having repair, maintenance or construction work done thereon by an independent contractor. Since the work contracted for may be faulty and constitute a hazard to invitees coming onto the premises thereafter, particularly employees of subcontractors, see Meny v. Carlson, 6 N. J. 82, 95 (1950), there may under appropriate circumstances be a duty of inspection by the land occupier of the work of the subcontractor, default as to which and consequent injury to an invitee may subject the occupier to liability to the injured invitee. Prosser, Torts (2nd ed. 1955), Sec. 64, pp. 358-359; Harper and James, Torts, sec. 26.1, p. 1362, sec. 26.11, p. 1405; 2 Restatement, Torts, sec. 412 pp. 1114-18; see Bergquist v. Penterman, 46 N. J. Super. 74, 85 (App. Div 1957), certif. den. 25 N. J. 55 (1957); Blankley v. Nostrame, 30 N. J. Super. 405, 407-8 (App. Div. 1954)."

Other common law states have repeatedly recognized and enforced the same rule. In *Gulf Oil Corp.* v. *Bivins*, 276

Fed. (2) 753, cert. den. 364 U. S. 835, the Court of Appeals for the Fifth Circuit said at page 758:

> "We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employee of an independent contractor who has undertaken to do work on the property, of dangers that are hidden or inherent in that property, * * *."

In *Madden* v. *Minneapolis & St. Louis Ry. Co.*, 32 Minn. 303; 20 N. W. 318, the Court said at page 306:

> "There is no difference as to the duty of the master and the assumption of risk by the servant, between an employment to make repairs and any other employment. In all cases the servant is held to take on himself the risks necessarily incident to the employment, unless, perhaps, they be latent and known to the master, but not known to, nor by the use of proper diligence discoverable by the servant; and in no case does he take on himself risks that arise by reason of neglect on part of the master, unless they be known to him or by the use of proper diligence are discoverable by him."

In *Welle* v. *Celluloid Co.*, 175 N. Y. 401, the Court said at pages 404-405:

> "Though the case is a close one we think the nonsuit was erroneous. Doubtless, the plaintiff by his long service, three or four years, assumed the risks which the general plan or method of the operations of the defendant involved * * *. But the plaintiff did not necessarily assume the risk of defective or improper appliances in that plan or method of work, unless the defect was obvious or he had so long used the appliance as to be chargeable in law with knowledge of its insufficiency. He had the right to rely on the presumption that the master had done his duty in furnishing safe and suitable appliances."

In *Martin* v. *DesMoines Edison Light Co.*, 131 Ia. 724; 106 N. W. 359, the Court said at page 733:

> "It would be a most unreasonable rule, if the act of a servant in undertaking an unusually dangerous service for the master should relieve such master from all obligations to exercise reasonable care for the servant's safety. The servant may properly be held to the risk of the extraordinary service; but he never takes the risk of the master's negligence under any circumstances, save when he knows of such negligence or as a reasonably intelligent person ought to have known of it and chooses to remain in the service."

In *Engstrom* v. *Ashland Iron & Steel Co.*, 87 Wis. 166; 58 N. W. 241, the Court said at page 171:

> "But it is obvious that the duties of the plaintiff and other employees of the defendant required them, from time to time, to go upon the roof at or near that place, and that the plaintiff was in the pursuit of his duties at the time he so went there. The defendant was bound to furnish the plaintiff with a reasonably safe place in which to work, or to notify him of any latent or unforeseen danger. Hulehan v. G. B., W. & St. P. R. Co., 68 Wis. 520; Nadau v. White R. L. Co., 76 Wis. 127. Here the danger was hidden, and could only be known to those who understood the effect of leaving ashes, dirt, etc., to accumulate upon the roof for a long time."

The third limitation on the general rule relied on by the majority of the Court of Appeals is that in order to imply an assumption of risk by an employee, the risk or the hazard must exist at the time the employee was engaged as such by his employer. Here, plaintiff's deceased was engaged in 1952 when the cables were new, and no hazard in their use existed at all, nor for many years thereafter. Since the assumption of risk is a purely contractual obli-

gation, it does not exist where, as in this case, the hazard is created a long time subsequent to the making of the contract of employment. In *Rivers* v. *Krasowski*, 303 Mass. 409, the Court said at page 412:

> "It is not clear on the record whether during those months there were successive contracts of employment made at the beginning of each of the short periods that he worked. But the auditor found that, during the last three months preceding his injury, the plaintiff worked regularly as business and weather conditions permitted. We think the inferences were warranted that during this latter period he worked under a continuing contract of employment and that the defect that caused his injury was not in existence when the period began. A finding was warranted that there was no contractual assumption of the risk by the plaintiff."

In *McCauley* v. *Norcross*, 155 Mass. 585; 30 N. E. 464, the Court said at page 216:

> "The defendant contends that the plaintiff contractually assumed the risk arising from the existing conditions. *Sylvain* v. *Boston & Main Railroad*, 280 Mass. 503. But it appears from the evidence that the floor was not greasy when the plaintiff first went to work. It is apparent, therefore, that the source of danger arising from the work could not have been within the contemplation of the parties when the relation of master and servant began. Consequently there was no contractual assumption of risk. *Demaris* v. *Van Leeuwen*, 283 Mass. 169, 171."

In *Martin* v. *DesMoines Edison Light Co.*, 131 Ia. 724; 106 N. W. 359, the Court said at page 735:

> "When a servant enters the employment of a master, he is presumed to have taken into considera-

tion such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. The risk thus arising, which involves no element of negligence on the part of the master, the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his hands."

In *St. Louis, etc., Ry. Co.* v. *Naylon*, 17 Cols. 501; 30 Pac. 249, the Court dealing with a defect in construction done after plaintiff was employed for some time, said at pages 503 and 504:

> "He had an undoubted right to expect a degree of care and skill equal to that ordinarily exercised during a progress of railroad construction. Colo. Midland Ry. Co. v. O'Brien, 16 Colo. 219. The record shows very clearly that such care was not taken in the present instance and that the accident resulted from its omission. The single spiking of three ties and entire failure to spike the fourth tie upon such a curve appears by the evidence to have been negligence which exposed appellee to an extraordinary and unusual hazard—a hazard that was not contemplated in his employment."

Finally we submit, that the assumption of risk rule invoked by the majority of the Court of Appeals to dismiss the complaint herein is a defense not open to the respondent. Such defense is based on and is presumably a part of an employment contract. The plaintiff's deceased had no contract whatsoever with the respondent. This action is based upon negligence of the respondent in providing a sole means of access to the place of work in the respondent's plant with a concealed and unknown fatal defect. This action is based on tort, and not on contract. It is

based on the common law duty of the owner of the premises where the work is to be performed to provide a safe approach to the place of work (see cases, *supra*, at p. 6).

In *Hess* v. *Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415; 114 N. E. 808, Judge Pound speaking for the unanimous Court said at pages 418 and 419:

> "If the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance (Huston v. Dobson, 138 App. Div. 810; Fuller v. Mulcahy & Gibson, 164 App. Div. 829), but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency. They are no part of the employer's plant; he is under no absolute duty to furnish them and the statute has no application."

Here, the sign and the scaffold were fixed fixtures of the respondent's building and its plant.

In *Duggan* v. *National Constructors & Engineers*, 223 App. Div. 163; 228 N. Y. S. 126, the Court unanimously said at pages 129 and 130:

> "These ladders constructed by the Masten Company were at the place in question the sole means of getting up and down through the building * * *.
>
> The defendant Masten Company owed a duty to all the employees, whether its own or others rightfully on the premises, who used the ladder to the knowledge of the defendant, or its superintendent in charge with its implied consent. An obligation under the circumstance here disclosed arises in an owner or contractor who erects a ladder to anticipate that it will be used by persons engaged in occupations in the construction of the structure, but not in his employ. Where the nature of the construction and the commingling of the employees in a common object at the time of the erection of a ladder requires it, a person who constructs a

> scaffold or erects a ladder to be used in the performance of labor in the erection of a building has a duty incapable of delegation, not merely to his own employees, but to all others making use of the structure for that purpose, to make such instruments of performance safe. The mere fact that it was sued by one not an employee of the defendant does not discharge the latter of liability, where a duty exists of making a safe scaffold or ladder for use of employees in the performance of the work. In the situation here defendant ought to be held to have foreseen, or to have been obliged to foresee, that the ladder was to be used as plaintiff so used it at the time of its collapse."

Compare liability of property owner to invitees, such as plaintiff's deceased, defined in Restatement, Torts, secs. 343, 412.

Conclusion

That because the majority of the Court of Appeals had no power under Rules of Civil Procedure to grant judgment to respondent, this Court in the exercise of its judicial supervision over the lower federal courts is requested to summarily order rehearing of petitioner's appeal *en banc* before the Circuit Court of Appeals or, in the alternative, to grant a writ of certiorari to said Circuit Court of Appeals because of the importance of the question of liability to the millions of employees by negligent land owners employing independent contractors.

Dated, New York, New York, July 29, 1964.

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